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After *Kingdomware*, an FSS Contract May Be a Key to the VA's Procurement Castle

Hear ye, potential contractors to the Department of Veterans Affairs (VA): two bid protest decisions issued late last year have upheld the VA's practice of purchasing from Federal Supply Schedule (FSS) contractors without the need to consider setting aside such purchases for veteran-owned small businesses (VOSBs), or service-disabled veteran-owned small businesses (SDVOSBs). As a result, businesses of all shapes and sizes may wish to consider getting "on the schedule" so as to benefit from its competitive advantage, while it lasts.

The precedent-setting on VA set-asides for veteran-owned businesses began with a protest before the Court of Federal Claims (COFC) by *Kingdomware Technologies (Kingdomware)*, of Waldorf, Maryland. *Kingdomware*, which is an SDVOSB, ultimately challenged three VA FSS awards on the grounds that they were made in violation of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (Act). According to *Kingdomware*, under the Act, the VA is required to determine whether at least two VOSBs or SDVOSBs are capable of meeting a contract requirement at a fair price before deciding to pursue a different procurement method, including resorting to the FSS. COFC Judge Nancy Firestone disagreed, finding that the language of the Act does not specifically address whether FSS contracts are subject to the set-aside requirement for veteran-owned businesses, and the VA's consistent approach holding FSS contracts outside the requirement is reasonable.

Judge Firestone's decision departs from the *Aldevra* line of protests at the Government Accountability Office (GAO). In that line of cases, the GAO sustained protests involving similar allegations to those made by *Kingdomware*, explaining that the VA should have been setting aside procurements under the Act when its prerequisites were satisfied. Indeed, *Kingdomware* had benefited from the *Aldevra* decisions in a successful protest before the GAO in May 2012. The VA, however,

told the GAO in no uncertain terms that it would keep to its policy of omitting FSS contracts from veteran set-aside requirements. By that time, Kingdomware had filed its initial complaint with the COFC, which it amended in July 2012 to challenge the three specific VA FSS awards.

In the midst of its COFC protest, *Kingdomware* initiated yet another GAO protest involving the Act. This time around, however, the GAO dismissed the action on jurisdictional and timeliness grounds. When *Kingdomware* moved for reconsideration, it got an entirely different decision than it bargained for, thanks to the COFC. In light of Judge Firestone's holding issued just weeks earlier, the GAO abandoned its own precedent on the scope of the Act, and stated that it will no longer consider protests based solely on the VA's decision not to set aside a procurement for veteran-owned businesses before purchasing from the FSS.

This result is positive news for current FSS contract holders, though the benefit of slightly lower competition could be short-lived. In a footnote to her decision, Judge Firestone mentioned a House bill that would extend the VA's veteran and small-business set-aside goals to FSS contracts. And *Kingdomware* may inspire more contractors to get on the schedule – including veteran-owned businesses. Readers interested in learning more about and applying for FSS contracts should contact Reed Smith's Government Contracts Group.